Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM, 1978

No. 77-1864

REV. ROY H. WHITE

Petitioner,

v.

UNITED STATES OF AMERICA.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

MILTON R. HENRY
2211 E. Jefferson Ave.
Detroit, Michigan 48207
Phone: 313-393-0100
Bar No. P-14884
Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINIONS BELOW....2
JURISDICTION....2
QUESTION PRESENTED....2
CONSTITUTIONAL PROVISIONS INVOLVED....3
RULES OF COURT INVOLVED....4
STATEMENT OF THE CASE ON APPEAL....4
ARGUMENT ON THE APPLICABLE LAW....7
CONCLUSION....19
APPENDIX....1a

TABLE OF AUTHORITIES

Cases:

Arkansas v. Kan. & T. Coal Co., 183 U.S. 185, 46 L.Ed. 144, 22 S. Ct. 47....11

Barber v. Page, 390 U.S. 719, 20 L.Ed.2d 255, 88 S. Ct. 1318....7

Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S. Ct. 1105....15

Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96, S. Ct. 2240....17

Dutton v. Evans, 400 U.S. 74, 27 L.Ed.2d 213, 91 S. Ct. 210....8

Edwards v. U.S., cca 9, 375 F.2d 862....12

Garner v. Louisiana, 368 U.S. 157, 7 L.Ed.2d 207, 82 S. Ct. 248....11

Glasser v. U.S., 315 U.S. 60, 86 L.Ed. 680, 62 S. Ct. 457.14

Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S. Ct. 1489....15

Myers v. U.S., cca 8, 14 F.2d 329....12

Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S. Ct. 1065 8
Raffel v. U.S., 271 U.S. 494, 70 L.Ed. 1054, 46 S. Ct. 566 10
Shapleigh v. Mier, 299 U.S. 468, 81 L.Ed. 355, 57 S. Ct. 261 10
U.S. v. Coppola, cca 2, 425 F.2d 660 12
U.S. v. Dolleris, cca 6, 408 F.2d 918 13
U.S. v. Hale, 422 U.S. 171, 45 L.Ed.2d 99, 95 S.Ct. 2133 17
U.S. v. Impson, cca 5, 531 F.2d 274 17
U.S. v. Johnson, cca 5, 558 F.2d 1225 17
U.S. v. Stevens, cca 5, 538 F.2d 1023 17
U.S. v. Zimmerman, cca 7, 108 F.2d 370 12

Rules Cited

Rule 801, Federal Rules of Evidence ..... *passim*
Rule 26, Federal Rules of Criminal Procedure 4,11

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REV. ROY H. WHITE

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v.

UNITED STATES OF AMERICA.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

Petitioner, REV. ROY H. WHITE, respectfully prays that a Writ of Certiorari will issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on April 14, 1978, and to review that said decision, and the denial of a rehearing of said proceeding dated June 1, 1978, where both the ruling and denial were erroneous, and failed to treat with the paramount issue of the right of the petitioner to confront and cross examine witnesses against him, as guaranteed by the Sixth Amendment to the United States Constitution, as well as the limited applicability of Federal Rules of Criminal Evidence, 801 (d)(2)(B)(C) and (D), under the

pressure of the Fifth and Sixth Amendments to the United States Constitution, when relied upon by the government in criminal cases.

OPINION BELOW

The opinion of the Court of Appeals, as well as the District Court findings and ruling are contained in the original record which has been supplied to the Court of Appeals in connection with proceedings had therein. A copy of the Opinion of the Court of Appeals is appended to the within petition for certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on April 14, 1978. A timely petition for rehearing was denied by the Sixth Circuit Court of Appeals on June 1, 1978.

The jurisdiction of the Supreme Court is invoked under the provisions of Section 1254(1), Title 28 U.S.C., and Rules 19(b) and 22(c) of The Rules of Procedure for the Supreme Court of the United States.

QUESTION PRESENTED

WHETHER, within the ambit of the Confrontation and Self-Incrimination Clauses of the Fifth and Sixth Amendments to the United States Constitution, a federal

conviction for wilful evasion of income taxes can be bottomed, in a material and critical sense, upon the testimony of an IRS Agent concerning alleged admissions of the defendant-appellant's attorney to the IRS Agent, made by said attorney both in and out of the defendant's presence; and WHETHER provisions of the Federal Rules of Evidence, at 801 (d)(2)(B)(C) and (D) are unconstitutional when put into effect in a Federal Criminal trial, and relied upon to authorize the reception into evidence of the statements of a declarant-attorney who was not called by the government as a witness in its case, depriving the defendant, thereby, of all opportunity to cross-examine the alleged declarant-attorney, or to confront the said declarant, upon his trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment:

"No person . . . shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to be confronted by the witnesses against him . . . ."

RULES OF COURT

Rule 26, Federal Rules of Criminal Procedure:

"In all trials the testimony of witnesses shall be taken orally in open court . . . ."

Rule 801, Federal Rules of Evidence:

Statements which are not hearsay.
"A statement is not hearsay, if:
2) Admission by party-opponent—The statement is offered against a party and is (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

The Petitioner, REV. ROY H. WHITE, was brought to trial on a Three (3) Count Indictment charging him with wilful evasion of income taxes, for the years 1970, 1971, and 1972, by filing false returns for the years 1970 and 1972, and by failing to file any return for they year 1971, and by understating his true income for those years, having earned $18,000.00; $89,000.00; and $96,000.00, for each of those years, while reporting $1800.00 for 1970; and $10,000.00 for 1972. The actual tax due on said income being $4000.00 for 1970; $19,000.00 for 1971; and $43,000.00 for 1972.

Upon trial, and in its opening statement to the jury, the government argued, "We will present evidence showing that the defendant kept no records for the bail bonding business, the record store, the basketball team, and despite the fact that associates and his lawyers told him to." (App. p. 6a)

In its opening statement the government also promised the jury, . . . ". . . we'll present to you the agents who investigated the case, and they'll talk about the investigation as they conducted it, as circumstantial evidence of the defendant's intent to evade the payment of taxes." (App. pp. 6a, 7a)

True to its promise, during the trial, Agent STEPHEN HOWARD, was permitted to tell the jury that during his investigation of the appellant's possible tax case, he visited appellant's attorneys, and that they advised him, out of the presence of Rev. White, that Rev. White had not furnished them with any records of his income, (App. pp. 7a, 8a); and that they had been having a hard time getting his records; that they couldn't force a client to keep records; that the appellant seemed inclined not to cooperate with them (App. pp. 9a, 10a); that their firm was having trouble getting information from the appellant, (App. p. 11a); and that the appellant was elusive in regard to the furnishing of information necessary to a construction of a taxable net worth. (App. p. 11a)

These so called "admissions" of the appellant's attorney, were received over the appellant's objection on the trial, notwithstanding the fact that the alleged conversations were between the IRS Agent and the attorney, and took place out of the presence of, and behind the back of the appellant, REV. WHITE.

Appellant claimed that the admission of this hearsay testimony, and the non-production of the attorney who was supposed to have made the statements to the IRS Agent, constituted a denial to him of his right, on the trial, to confrontation of the attorney, and cross-examination of the attorney, whose reputed statements went to the very heart of the claimed intent to permanently deprive the government of taxes rightfully due it.

On appeal, the Sixth Circuit affirmed the conviction of the appellant, and claimed that Federal Rules of Evidence, 801 (d)(2)(B), served as authority for admission of the testimony of the IRS Agent as to statements of the attorney made in the presence of the defendant; but held that the particular statements outlined hereinabove, "were no more than conclusory observations, hearsay in nature, which did not possess sufficient merit or relevance to warrant their admission as an exception to the hearsay rule. Fed. R. Evid. 801 (d)(2)(C) and (D).

Then, without apparently considering the tenor of the hearsay which was admitted, which went to the heart of the issue of 'intent to evade taxes,' the Court of appeals callously stated, "the error did not adversely affect the substantial rights of the defendant and was harmless."

This petition has been filed to contest that ruling, as well as whether, if the Sixth Amendment right of confrontation was violated by following the Federal Rules of Evidence in a Criminal trial, such departure from Constitutional right can ever be deemed harmless beyond a reasonable doubt.

ARGUMENT ON THE LAW

The within petition questions the constitutionality of any criminal conviction in which hearsay, going towards the very heart of a criminal case, can ever be admitted, on any theory of law, or under authority of any Federal Rule of Evidence, in disregard of the plain provisions of the Sixth Amendment, which require that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

That language admits of no exceptions; and certainly is at 100% odds with a Rule of Evidence that purports to allow statements made by an attorney in his client's presence to suffice as evidence of the client's guilt, in a federal criminal trial, on some strained theory of agency, or employment relationship, or adoption by virtue of the client's silence.

The law relative to the right of confrontation, as expressed in *Barber v. Page*, 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1318, 1968, has been that "the right (of a defendant) to confront (his accusers) is basically a trial right. It includes both the opportunity to cross-examine, *and the occasion for the jury to weigh the demeanor of the witness.*" Id., at 725, 20 L.Ed.2d, at 260.

Where an IRS Agent testifies, in a criminal trial, to the alleged words of an attorney made out of the presence of the defendant, and puts that attorney's words before a jury, without production of the attorney himself, there has to be a clear denial to the defendant of his right to have the jury look at the demeanor of the attorney, as well as a denial of the right of cross-examination of the attorney.

Since the defendant has an indefeasible right "to have the jury weigh the demeanor of" that attorney, if his testimony is to be received of proof of the defendant's guilt, it actually makes no difference whether the statement was claimed to have been made in or out of the presence of the defendant. What the Constitution requires, in criminal cases, as distinguished from civil ones, is that "the accused shall enjoy the right to be confronted" with *all* witnesses against him.

What may be alright in a civil case has nothing whatever to do with a criminal case. There is no constitutional provision requiring that in all civil cases the litigants shall enjoy the right to be confronted with the witnesses against him; and, I suppose that, accordingly, the Supreme Court, or anybody else may very well feel free to adopt any rule they desire in that area. But, the constitution was adopted by the People, not any agency, or branch of government; and the People have said that "*in criminal cases*" the accused *shall* enjoy the right to be confronted with the witnesses against him.

Where an IRS Agent, in a criminal trial, testifies to the alleged words of an attorney made out of the presence of the defendant, and puts that attorney's words before a jury, without production of the attorney himself; there is a clear violation of the confrontation clause, since the defendant has that indefeasible right to cross examine the attorney, and to have the jury weigh his demeanor, if his words are to be received as proof of the defendant's guilt.

To like effect have been the collateral holding in *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, 1965; and *Dutton v. Evans*, 400 U.S. 74, 27 L.Ed.2d 213, 91 S.Ct. 210, 1970.

Nothing suggested in any of these cases can be read to imply that a criminal trial can properly be reduced qualitatively to an administrative, or justice court proceeding, in which Rules adopted by the Judiciary can operate to make ineffectual Constitutional Rights enshrined in the hard and plain language of the document, rights which make mandatory, "in criminal cases" the production of the witnesses whose testimony is to be received by a jury for assessment of guilt.

F. Rule of Evid. 801, which authorizes the use of "admissions" in other than criminal cases, cannot act to wipe out the significant portions of the Confrontation Clause of the Sixth Amendment.

The provisions of Rule 801, F. Rules of Evid., by their language, if operative to the full tenor thereof, would, in criminal trial, substantially alter, and remake the form and character of all criminal trials, as we have understood them to be, in American Courts.

Government Agents, as in this case, could testify to anything, and say, as is too frequently the case with the police officer on the beat who always has a hidden 'reliable informant' in his pocket, that some third party, whose appearance would never be required in court, said thus and so.

And, by so being allowed to testify, guilt of an accused would be established by persons not before the court, and defendants would have no means of countering this hearsay, save by taking the stand, and attempting to remove the taint of the claimed admissions.

And, of course, the self-incrimination clause of the Fifth Amendment, would then be brought into focus, as a defendant, forced to answer against this type of hearsay,

would at the same moment have to expose himself to possible cross-examination by a prosecutor as to his past, his record, and countless other inquiries aimed at testing his so called "credibility" and/or reputation. Cf. *Raffel v. U.S.*, 271 U.S. 494, 70 L.Ed. 1054, 46 S.Ct. 566, 1926.

More than that, to permit the reception of statements of one's attorney "concerning a matter within the scope of his employment" to be received against a defendant, where, as here, the critical statements were made to an IRS Agent out of the presence of a defendant, is totally at odds with any reasonable understanding of due process, and/or fair play.

Criminal cases are not civil cases; and the distinctions between them derive from ancient and studied considerations.

Underlying the criminal trial, and any announced requirement of confrontation and the taking of sworn testimony of the accuser, is our basic regard for individual liberty—our view that liberty is a sacred thing—that persons *must be* convicted by fair methods, in fair trial proceedings. Our sentiments about these things run deep for Americans.

Every line of the Fifth and Sixth Amendments reflects more than mere lip service concern for the integrity of the guilt assessing process. We see in them an abhorence of the "secret accuser;" the wrack and pinion; the undefined and unspecified prosecution. The plain unencumbered language of those Amendments is refreshingly reassuring to every citizen who reads them.

Former Supreme Court Justices have tried to write as plainly as they could about the quality of proof required in criminal cases. For example, in *Shapleigh v. Mier*, 299 U.S. 468, 475, 81 L.Ed. 355, 359, 57 S.Ct. 261, 113

A.L.R. 253 (Annotated in *A.L.R.*), the Court said, in speaking of the propriety of establishing criminal liability without a witness under oath, and by judicial notice:

> Heed must be given to the burden of proof, at least when other tests are lacking . . . . Judicial notice is unavailing to rid them of that burden . . . .

And, from *Arkansas v. Kansas & T Coal Co.*, 183 U.S. 185, 46 L.Ed. 144, 22 S.Ct. 47:

> "As to judicial knowledge, the principle applies 'that the right of the Court to act upon what is in point of fact known to it must be subordinated to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." 183 U.S., at p. 190; 46 L.Ed., at p. 147)

Further, Federal Rule 26 of the Federal Rules of Criminal Procedure again points to the need for the testimony of all witnesses in all criminal trials to be taken in open court . . .

This again, would outlaw the receipt of a witness' testimony through the mouth of anyone, much less an IRS Agent.

The analogy between what has been said by the Supreme Court in relation to "Judicial Notice of Facts" in criminal trials, and the situation where hearsay of a non-appearing witness is received, is close indeed.

If Judicial Notice cannot supplant affirmative proof from a witness' mouth, then neither can "hearsay of the type here received. As stated in *Garner v. Louisiana*, 368 U.S. 157, 173, 174, 7 L.Ed.2d 207, 219, 82 S.Ct. 248, to permit such hearsay to be used would turn the Rule "into a pretext for dispensing with a trial."

In the within case the defendant's defense turned solely upon his claims that he had employed the best, most knowledgeable tax firm in the area, prior to any criminal investigation being instituted, to prepare his returns and represent him before the IRS.

He paid his lawyers a retainer fee of $2,100.00 as an initial retainer to represent him in relation to all tax matters, f all three years involved in the within prosecution.

Under such circumstances then, whether the defendant-appellant, had a personal intent to permanently deprive the government of taxes rightly due it (*Edwards v. U.S.*, cca 9, 375 F.2d 862) could only be established by the government showing that the defendant had hired the attorneys as a sham; but actually intended to prevent them from doing the work for which he hired them.

The affirmative act of tax evasion then, according to the government's theory, became the refusal of the defendant-appellant to cooperate with the attorneys he had retained to intercede on his behalf with the IRS. (Cf. *U.S. v. Coppola*, cca 2, 425 F.2d 660)

The government offered the testimony of the IRS Agent upon the so called admissions of the defendant's attorney, out of his presence, to show that the defendant in fact failed to keep books and records and never presented any tax information to the attorneys. (Cf. *Myers v. U.S.*, cca 8, 174 F.2d 329; and *U.S. v. Zimmerman*, cca 7, 108 F.2d 370)

The reason the government offered the alleged statements of the attorney, made out of the defendant's presence, to the jury, was to prove the single most critical element of the claimed evasion they had brought against Rev. White; namely that he had purposefully avoided complying with his attorneys' request for information that would enable them to prepare proper tax returns.

Such critical testimony actually could not be received from the mouth of an agent.

First of all because, even under Rule 801 (2)(C), it could not be deemed to have been a statement which the defendant would be expected to authorize (Cf. *U.S. v. Dolleris*, 408 F.2d 918, 6 cir, 1969); but also, as we will discuss below, because the Courts do not recognize any such thing as a "tacit admission" of guilt.

The record in the case contained no evidence of the defendant's refusal to provide his tax attorneys with sufficient records of his worth, except that provided by the IRS Agent, in the references to the statements of the defendant's attorney.

On the other hand, the trial record did affirmatively reflect the testimony of appellant's accountant, LOY COHEN, hereunto attached at App. pp. 4a, 5a, which showed that had the appellant's returns been properly filed, and the taxpayer afforded deductions to which he was lawfully entitled, the difference between the amount reported and the amount due the government would have been but $628.13 (See Schedule II, App. p. 4a)—an amount which, under no circumstance, would justify an inference of evasion. Additionally, Schedule I, attached hereunto App. p. 5a, indicates that, on a cash flow basis, for the year 1972, that difference would only have been $2.67. Obviously no comment is needed on this fact.

It cannot be over-emphasized that the appellant, as a lay person, could not be expected to understand the IRS Code and its voluminous provisions.

Even the government's chief analyst in the case, KENNETH PETERSON, admitted on the trial that differing IRS personnel arrived at different results in

interpreting the Code with respect to the same cases. (P. 167 of trial transcript)

Certainly, the appellant, as client, was entitled to expect that attorneys, who had themselves been former IRS Agents, would represent his interests better than is reflected in the trial record; and, based upon the analysis of LOY COHEN, the defendant's accountant upon the trial, one would have to seriously question the type of representation appellant was in fact afforded.

Under such circumstances, where the record suggests a situation in which the attorneys were under pressure to justify their own failures and ineptitude, one could only expect that their testimony would tend to cast responsibility for the problem upon the defendant; and under such circumstances, the trial court should have been overly sensitive to the possibility that the testimony of such attorneys was in the nature of an attempt to exonerate themselves for failing, in one instance, to file a return, and in the other instances, to file returns reflecting the full taking of all possible deductions for the client.

In the within case, in the Court of Appeals, the Court said:

> ". . . , the Court concludes that, considered in context of the record as a whole, the error did not adversely affect the substantial rights of the defendant and was harmless."

That language, under the circumstances, hardly squares with language contained in *Glasser v. United States*, 315 U.S. 60, 67, 86 L.Ed. 680, 698, 62 S.Ct. 457, (Headnote 6), viz: "Where the scales of justice are delicately poised between guilt and innocence, error which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial."

Additionally, *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105, stands for the proposition that reversal is required wherever a defendant's Sixth Amendment right of confrontation of a witness has been impaired, in any critical area affecting the defense of a criminal case. There, it was claimed that the State's paramount policy of protecting juvenile offenders precluded proof of a juvenile probation record. The Court made clear that, as to such juvenile records, non-disclosure had to yield to the requirements of the Sixth Amendment.

As yet, the Supreme Court has had no occasion to pass upon the Constitutionality of Rule 801 (d)(2), so far as this Rule operates to disparage Sixth Amendment rights; but, unless criminal trials in this Country are to become something substantially different from what they are now, by reason of constant erosion of settled Constitutional rights by judicial and other fiat, then the Supreme Court must grant certiorari in this case to pass upon the constitutionality of Rule 801, and to curb the continued attenuation of fundamental trial rights.

Additionally, the reception of statements of an attorney regarding his client, out of the presence of the client, made to an IRS Agent, clearly violates the self-incrimination provisions of the Fifth Amendment.

For if, as stated in *Malloy v. Hogan*, 378 U.S. 1, 8, 12 L.Ed.2d 653, 84 S.Ct. 1489, the privilege against self-incrimination is fulfilled only when a person is given the right to remain silent unless he chooses to speak "in the unfettered exercise of his own will," then it is clear that statements of his lawyer, even if given an enforcement agent under a power of attorney executed only to facilitate adjustment of civil tax claims, could not be received in a

civil case against the defendant, since he has nowhere indicated any willingness to waive his Fifth Amendment rights against self-incrimination.

The Power of Attorney executed by the defendant taxpayer contains no such authority or waiver. It simply empowers the attorney, to do the following things:

> "to receive confidential information and full power to perform on behalf of the taxpayer the following acts with respect to the above tax matters:
>
> a) to receive . . . checks in payment of any refund, etc.
> b) to execute waivers of restrictions on assessment or collection of deficiencies in tax and waivers of notice of disallowance of a claim for credit or refund.
> c) To execute consents extending the statutory period for assessment or collection of taxes.
> d) To execute closing agreements under 7121 of the IRS Code
> e) To delegate authority or to substitute another representative.

Nothing contained in that power of attorney could possibly be construed as a waiver of the defendant's right against self-incrimination; and reception of the attorney's statement regarding the defendant's statements to him, etc., over his objection, violated his rights under the Fifth Amendment against self-incrimination, and voids his conviction; and especially since the privilege extends to any statement or actions furnishing a link in the chain of evidence needed to prosecute. (Cf. Malloy v. Hogan, supra)

Finally, the Court should rule, even as to statements made by an attorney in the presence of an accused, which are not followed up by any response from the accused, that the prosecution must rely upon evidence other than the silence of the accused to prove its case.

"Tacit Admissions" have been outlawed in case after case. The Courts universally ban the use of present-day defendant's post-Miranda (*Miranda v. Arizona*, 384 U.S. 436, 1966) silence to establish guilt—and this is especially true where the silence is ambiguous and without ascertainable significance.

> Cf. *U.S. v. Hale*, 422 U.S. 171, 45 L.Ed.2d 99, 95 S.Ct. 2133; *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240; *U.S. v. Stevens*, 538 F.2d 1203, 1205, 5 cir., 1976; *U.S. v. Johnson*, 558 F.2d 1225, 5th cir., 1977.

If silence of an arrestee "lacks any significant probative value," then how much less value can be assigned to the silence of a client who sits in on a conference between his attorney and an IRS Agent. To ask is to answer the question.

Such evidence must be excluded, under the Fifth Amendment, "because it carries with it an intolerable prejudicial impact." Cf. *U.S. v. Impson*, 531 F.2d 274, 5th cir., 1976.

That case affirmatively says that silence of an accused, irrespective of whether before a Miranda warning, *cannot* be used against a defendant, where he does not testify, and make some inconsistent exculpatory statement on his trial, bearing upon the matter.

The Sixth Circuit, by its opinion below, authorizes the use of such double hearsay under authority of the F. Rules of Evidence, 801 (d)(2), notwithstanding the proscriptions of the Fifth and Sixth Amendments and the collateral holdings of other circuits.

Furthermore, the according of Rules of Evidence supremacy over the confrontation clause of the Sixth Amendment, and the Self-incrimination clause of the Fifth

Amendment, poses a significant danger to the entire American system of criminal justice.

Because the Supreme Court has not passed upon the constitutionality of the F. Rules of Evidence, 801 et. seq., and because of the continuing use of such rules in disregard of the Constitution, certiorari should be granted in the within case.

Furthermore, cases of this kind affect every citizen in the country in a significant manner; and if the law is to be applied as was the case here, then every citizen in this country ought to be informed of the peculiar nature of Income Tax prosecutions, and of the fact that they have no right to expect that the Constitution is operative in the area of Income Tax prosecutions.

Needless to say, the within petition substantially affects the public at large; and the administration of the criminal justice system itself.

CONCLUSION

For the foregoing reasons, certiorari should be granted to inquire into the legality of the procedures employed in the trial of the accused, and to vindicate his constitutional rights under the Sixth and Fifth Amendments, and he should, upon review, be granted a new trial.

Respectfully submitted,

MILTON R. HENRY
Attorney for Petitioner
2211 E. Jefferson Ave.
Detroit, Michigan 48207
Phone: 313-393-0100
Bar No. P-14884

INDEX TO APPENDIX

Page

Opinion of the Court of Appeals, below 2a-3a
Schedules of Accountant, LOY COHEN 4a-5a
Government's Opening Argument. 6a-7a
Testimony of IRS Agent Stephen Howard 7a-10a
Objection to Howard's Testimony 10a-13a
Power of Attorney executed by appellant 14a
Order Denying Rehearing of Appeal 15a

77-5286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

V.

ROY H. WHITE,

Defendant-Appellant

ORDER

FILED
APR 14 1973
JOHN P. HEHMAN, Clerk

Before: CELEBREZZE, ENGEL and MERRITT, Circuit Judges

Appellant Roy H. White was convicted in a jury trial in the United States District Court for the Eastern District of Michigan of three counts of attempted evasion of his income taxes for the years 1970, 1971 and 1972. Prior to his indictment, White had executed powers of attorney authorizing his attorneys to appear on his behalf before offices of the Internal Revenue Service, the powers of attorney being executed upon form number 2848, provided by the Internal Revenue Service. White did not testify in his own behalf, but his counsel's opening statement asserted the defense that the defendant in good faith relied upon the advice of counsel with respect to the matters alleged in the indictment. In the government's case-in-chief, Internal Revenue agents were permitted, over objection of the defense, to testify to certain admissions made by the attorneys both in and out of the presence of White but in the course of meetings with the agents.

Appellant relies principally upon this circuit's decision in *United States v. Dolleris*, 408 F.2d 918 (6th Cir. 1969) which, applied to the facts here, it is claimed, rendered the statements of the agent inadmissible as outside of the scope of the authority conferred by the powers of attorney.

The court finds no error in the admission of the testimony of the Internal Revenue Service agent concerning admissions made by defendant's attorney in his presence. *See* Fed. R. Evid. 801 (d)(2)(B). The court is of the opinion that it was error to have permitted the particular statements made by defendant's attorney outside his presence because they were no more than conclusory observations, hearsay in nature, which did not possess sufficient merit or relevance to warrant their admission as an exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(C) and (D).

However, the court concludes that, considered in the context of the record as a whole, the error did not adversely affect the substantial rights of the defendant and was harmless. Fed. R. Crim. Pro. 52(a). Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF
THE COURT

John P. Hehman

Clerk

COHEN · HUBBERT · HENSON TAX SERVICE CORP.
6212 CHENE
DETROIT, MICHIGAN 48211
313 · 921-1050

SCHEDULE II

ROY H. WHITE
ANALYSIS OF INCOME
PER ACCOUNTANT TESTIMONY
MR. FRANK KOPMEYER

	1972 Return	1972 Return
Adjusted Gross Income per Return		$ 67,000.00
Add:		
Testimony Corporation Assets		
Rolls Royce	$ 30,028.95	
Rental Property - 436 Orchard Lake Road	9,000.00	
Alarm System	364.00	
Furnance	1,700.00	
Total		41,092.95
Sub Total		108,092.95
Deduct:		
Depreciation per IRS Report		272.00
TOTAL INCOME		$ 107,820.95
Adjusted Gross Income per IRS Audit		$ 108,449.08
Difference		$ 628.13

Use section 453 Installment [illegible]
[illegible]

[illegible] the appendix

COHEN · HUBBERT · HENSON TAX SERVICE CORP.
6212 CHENE
DETROIT, MICHIGAN 48211
313 · 921-1050

SCHEDULE I

ROY H. WHITE
CASH FLOW ANALYSIS
FOR THE YEAR 1972

Income per Return		$ 67,000.00
Add:		
Depreciation	$ 15,251.67	
Loan	10,000.00	
Sale of Property	9,000.00	
Total		$ 34,251.67
Total Cash available		$ 101,251.67
Adjusted Gross Income per IRS Audit		$ 108,449.08
Deduct:		
Capital Gains Under Code Section #453 Installment Method reporting, (2,510.00 - 248.94)=	$ 2,261.06	
Unexplainable Gain or (Loss) on Sale of Personal Automobiles	4,736.27	
Total		$ 6,997.33
Total Income		$ 101,254.34
Difference		$ 2.67

* * *

. . . computation phase of our proofs. As I noted earlier, the other phase of our proof will show the defendant's intent, his knowledge that the two returns he filed were false, his knowledge that he should have filed a return for '71, and generally his intent to defraud. Again, intent is something we can't prove directly, we have to prove by circumstantial evidence.

In this phase of the proof, we'll call to the stand a man who prepared the defendant's 1970 and 1972 returns, a man named Ted Cronin, who works for Montgomery Ward, prepared the tax for the defendant, and Frank Kopmeyer, an accountant who was hired by the defendant's attorney, prepared the 1972 return, and they'll testify as to the circumstances surrounding the preparation of those returns.

Another important aspect of the circumstantial evidence as to showing the defendant's evasive intent, showing utter lack of books and records of income that he received. We will present evidence showing the defendant kept no records for the bail bonding business, the record store, the basketball team, and despite the fact associates and his lawyers told him to. Closely associating to that evidence, relating to the lack of books and records, will be an extensive showing that the defendant dealt extensively and almost exclusively in cash, thereby avoiding records, records such as what happens when you write a check.

To a large extent the dealings in cash are stipulated and you'll notice in paragraphs four, five and seven, that in the appendices to the stipulations, where there is a little c in parentheses, that indicates that transaction went down for payment in currency, in cash.

But, on top of that, we will submit some further evidence, some witnesses to explain, particular cash transactions to you. Another large aspect of the circumstantial evidence of the defendant's intent, we will show his conduct here. We will show you that he grossly understated his income for the years that he did file, and that he did not file for a year, in which he had a large income and so, our evidence will show, on the defendants' part overwhelmingly an intent to evade a large part of the income tax owed by him for the three years, and towards the end of the proofs, we'll present to you the agents who investigated the case and they'll talk about the investigation as they conducted it.

And so, ladies and gentlemen, our evidence will prove that the defendant wilfully and knowingly attempted to evade a large part of the income tax owed by him for these three years, and at the close of all . . .

* * *

Q Where did this meeting take place?

A This took place in the law office of Raymond, Fletcher and Dillon in Troy, Michigan.

Q And who was present in this meeting?

A John Raymond, Jr., John Raymond, Sr., myself, Richard O'Brien, the former special agent and Mr. Gavette.

Q At that time, did any of the taxpayer's representatives make any statements to you regarding the 1972 tax return?

A Yes.

Q Tell us what was said and who said it?

MR. HENRY: Well, I object to this. Again, we are talking about the criminal liability of the respondent. This isn't any civil case. Pure agency—this isn't a conspiracy

case either. I don't see Mr. Raymond sitting in here being tried for tax evasion. I would object to his comment made out of the presence of Reverend White. I think Reverend White's acts and words are material, but not Mr. Raymond's, not for this claimed criminal violation.

THE COURT: I'll overrule the objection.

THE WITNESS: John Raymond, Sr. said to me that his firm, in association with an accountant, that they had engaged, was attempting to prepare a 1972 income tax return for Mr. White and this return was being formulated on the basis of a net worth computation due to the fact that Mr. White had not supplied them with any records regarding his sources of income. John Raymond, Sr. indicated to me that Mr. White had income—had received income during 1972 from the bail bonding business, his record shop, preaching and he was involved in a semi-professional basketball team, but Mr. Raymond said that that was a losing business.

Q (By Mr. Rhodes, continuing): Did Mr. Raymond make any statements as to what this net worth computation would be based on?

A The computation was going to be based on information submitted to them by Mr. White and Mr. Raymond, Sr. said that they were having—that he was having a hard time getting the picture from Mr. White, with respect to his assets and his liabilities.

Q Did Mr.—did any of the taxpayer's representatives make any more particular statements about records?

A Mr. Raymond, Sr. said that he could not force one of his clients to keep records. He also stated that he had been led to believe, by Mr. White, that two other individuals were maintaining records for Mr. White.

Q Did Mr. Raymond—did either representative make any representation to you—excuse me, any statement to you about those records of those other two individuals?

A John Raymond, Sr. indicated that apparently they had not kept any records.

MR. HENRY: Well, now is this something we get off of the—off of Reverend White or is this something that John Sr. Raymond acquires on his own and if so, I would move that it be stricken.

THE COURT: I'll overrule your objection.

Q (By Mr. Rhodes, continuing): Referring your attention to the date of July 20th, 1973, on that occasion did you receive a telephone call from any of the taxpayer's representatives?

A Yes, I did.

Q From who?

A I received a telephone call from John Raymond, Sr.

Q And can you tell us the nature of the conversation of that—on that date?

A I scheduled an appointment with Mr. Raymond for the purpose of discussing Mr. White's tax liability in greater detail and an appointment was set for August of 1973, I believe it was August 3rd.

Q Directing your attention to the date of July 31st, 1973, did you receive a telephone call from any of the taxpayer's representatives?

A Yes, I did.

Q And from whom?

A Again, I received a call from John Raymond, Sr.

Q And tell us the substance of that conversation, as best you can remember it?

A John Raymond, Sr. told me that we should cancel the appointment. He further stated that his client did not seem

inclined to cooperate; he also stated that Mr. White did not like the manner in which the investigation was being conducted and that a third party, or other individuals, were being contacted. He—

THE COURT: Excuse me. Since we have had a continuing objection to this testimony, in view of his present statement, I think that would be the end of the testimony the Court would permit as to that conversation.

MR. RHODES: Well, I'm sorry—

THE COURT: The Jury may be excused.

MR. RHODES: I don't understand the Court's ruling.

(The Jury left the courtroom at 12:00.)

THE COURT: To clarify my ruling, Mr. Rhodes—

MR. RHODES: Please.

THE COURT: —it would appear from the statements now being made, the agency was terminated. Unless some indication the agency didn't terminate at that time—

MR. RHODES: Well—

THE COURT: I don't know that it did or not, but he just stated the man told him on the phone that Mr.—The Reverend White was securing other representation.

MR. RHODES: That's not what the testimony was, your Honor. The testimony was that simply, his client . . .

* * *

A Myself, Revenue Agent Anderson Williams, Sandy Minkow, Mr. White's representative and there was another attorney with Mr. Minkow who was an employee of the firm.

Q Do you know that man's name?

A I believe Edson Rop or Rupp.

Q On that occasion did any of the taxpayer's representatives make any statement about getting information from Mr. White?

A Sander Minkow stated that Mr. White was illusive in his furnishing of information to him, being Mr. Minkow.

MR. HENRY: I'd object to that. I'm wondering if this is relating to returns, this is in '74, the return, the last return in issue here is '72. '72, apparently, had two or three years.

THE COURT: I would sustain an objection to that answer. It's a conclusion of the person and not a statement of any particular circumstance as related to him and it's in conclusionary form. So, I'll strike it as a conclusion.

Q (By Mr. Rhodes, continuing): Well, let me rephrase the question then, your Honor.

Did Mr. Minkow state any more specifically what he meant by that?

MR. HENRY: I think it's irrelevant and in any event it does still call for a conclusion. It's in 1974 and the '72 returns have already been filed. I don't think it's relevant to any issue here. We don't know what he's talking about that he's now doing for Reverend White.

THE COURT: I'll overrule the objection in view of the fact that the '71 return had not yet been filed and apparently, had not been filed.

MR. WITNESS: Mr. Minkow stated that he was having trouble getting information from Mr. White.

Q (By Mr. Rhodes, continuing): Now, let me refer your attention to the date of February 27th, 1974. On that occasion, did you meet with any of the taxpayer's representatives?

A Yes, I did.

Q Who did you meet with?

A I'd like to refresh my recollection with that by reviewing a memorandum.

Q You may.

A That was February—

Q 27th, 1974.

A I've reviewed the memorandum.

Q The question is: Who else was present?

A Sandy Minkow, Special Agent Robert Paltier and Castle White.

Q On that occasion, did Mr. Minkow make any statements to you regarding the marital status of Mr. White?

A There was a discussion of that.

Q What did Mr. Minkow say in that regard?

A The—as far as what Mr. Minkow himself said, there was a discussion regarding this topic and his—his kind of closing statement was if push came to shove, they could—they being Roy White and Castle White, could get a marriage license and they could be considered married.

Q Did Mr. Minkow indicate to you that their marriage was a common-law marriage?

A If I could look at my memorandum?

Q You may.

A Mr. Minkow stated to me that it was the firm's position that Roy White and Castle White were married. And there was also a discussion of common—of a common-law relationship, common-law marriage. As far as him—he didn't come out and say this is a common-law marriage, the two were just talked about—well, in succession or together. I must say that I don't recall, anyway, that he said that.

Q All right. Now, in connection with your investigation of this case, did you make any attempt to determine, from

official records, whether or not Roy White and Castle White were, in fact, legally married?

A I did.

Q Tell us what you did?

A I checked the marriage license records for the counties, Oakland, Macomb and Wayne.

Q And did you find any evidence that Roy White and Castle White were legally married?

A I did not.

Form **2843**
(Rev. Jan. 1972)
Department of the Treasury
Internal Revenue Service

Power of Attorney
(See Separate Instructions)

Name, address including ZIP code, and identifying number of taxpayer(s)
Roy H. White 375-32-6233
620 S. Spinning Wheel Lane
Bloomfield Hills, Michigan 48013

hereby appoints (name, address including ZIP code, and telephone number of appointee(s))
John J. Raymond, Joseph F. Dillon and Sander L. Minkow
1400 Guardian Building
Detroit, Michigan 48226
964-2900

as attorney(s) in fact to represent the taxpayer(s) before any office of the Internal Revenue Service with respect to (specify Internal Revenue tax matters and years or periods):

Income tax matters for the years 1960 through 1972.

Said attorney(s) in fact (or either of them) shall, subject to revocation, have authority to receive confidential information and full power to perform on behalf of the taxpayer(s) the following acts with respect to the above tax matters:
(Strike through any of the following which are not granted.)
To receive, but not to endorse and collect, checks in payment of any refund of Internal Revenue taxes, penalties, or interest.
To execute waivers (including offers of waivers) of restrictions on assessment or collection of deficiencies in tax and waivers of notice of disallowance of a claim for credit or refund.
To execute consents extending the statutory period for assessment or collection of taxes.
To execute closing agreements under section 7121 of the Internal Revenue Code.
To delegate authority or to substitute another representative.
Other acts (specify) .....

Copies of notices and other written communications addressed to the taxpayer(s) in proceedings involving the above matters should be sent to (Name, address including ZIP code, and telephone number):
John J. Raymond
and 1400 Guardian Building
Detroit, Michigan 48226
964-2900

This power of attorney revokes all prior powers of attorney and tax information authorizations on file with the same Internal Revenue office with respect to the same matters and years or periods covered by this instrument, except the following:

.....
(Specify to whom granted, date, and address including ZIP code, or refer to attached copies of prior powers and authorizations)

Signature of or for taxpayer(s)

If signed by a corporate officer, partner, or fiduciary on behalf of the taxpayer, I certify that I have the authority to execute this power of attorney on behalf of the taxpayer.

x Roy H. White 9-26-73
(Signature) (Title, if applicable) (Date)

x .....
(Signature) (Title, if applicable) (Date)

GOVERNMENT Form 2848 (Rev. 1-70)

77-5286

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

V.

ROY H. WHITE,

Defendant-Appellant

ORDER

FILED

JUN 1 1978

JOHN P. HEHMAN, Clerk

Before: CELEBREZZE, ENGEL and MERRITT, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF
THE COURT

Clerk

Supreme Court, U. S.
FILED
SEP 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-1864

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY H. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1864

ROY H. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for tax evasion on the ground that the trial court erred in admitting testimony of internal revenue agents concerning admissions made by petitioner's attorneys to the agents.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of three counts of evasion of income taxes for 1970-1972, in violation of 26 U.S.C. 7201 (Pet. App. 2a). The trial court sentenced petitioner to a term of one year and a day on each count, the sentences to run consecutively. The court of appeals affirmed (Pet. App. 2a-3a).

1. Insofar as petitioner complains (Pet. 16-18) about the testimony of an internal revenue agent concerning admissions made in petitioner's presence by his attorneys,

the pertinent facts are as follows: On January 23, 1973, during the course of the investigation of petitioner, Agent Charles Gavette of the Internal Revenue Service and another agent met with petitioner and his attorneys, John J. Raymond, Sr. and John J. Raymond, Jr. (II Tr. 60-61).[1] Agent Gavette testified that petitioner's attorneys told him at that meeting that petitioner kept no records (II Tr. 69-70). They also told Gavette the net worth method, which was being used in the preparation of a tax return for petitioner, would be based on information that had been provided to them by petitioner (II Tr. 70). They further told Gavette that it was their procedure for John J. Raymond, Sr. and Jr. to take turns interviewing petitioner on alternate appointments in order to check the accuracy of what petitioner had told them (II Tr. 69).[2] Prior to the time the attorneys had made these statements, petitioner had executed the standard Internal Revenue Service Form 2848, appointing John J. Raymond, Sr., John J. Raymond, Jr., and Joseph F. Dillon as attorneys-in-fact to represent him before any officer of the Internal Revenue Service with respect to "income tax matters for the years 1960 through 1971" (Ex. 30; II Tr. 61-62).[3]

The decision below correctly held that these statements were admissible. As the court of appeals concluded, the statements in question were made by petitioner's

[1]"Tr." refers to the trial transcript.

[2]Petitioner does not specify in his petition the statements made in his presence which he now claims are inadmissible. At trial, petitioner's attorney objected to the agent's testifying as to what John J. Raymond, Jr., said was the procedure employed in interviewing petitioner (II Tr. 62-68).

[3]Petitioner executed a second power of attorney appointing John J. Raymond, Sr., Joseph F. Dillon and Sander L. Minkow as attorneys-in-fact with respect to the years 1960 through 1972 (Pet. App. 14a). The second power of attorney added the year 1972.

authorized representatives and concerned a matter within the scope of the attorneys' authority, *viz.*, petitioner's income tax liability for the years in question. Moreover, petitioner made no objection at the time his attorneys made the statements to the agent. They were accordingly admissible under Rule 801(d)(2) of the Federal Rules of Evidence. *United States* v. *Ojala,* 544 F. 2d 940, 945-946 (C.A. 8); *United States* v. *O'Connor,* 433 F. 2d 752, 755 (C.A. 5); *United States* v. *Dolleris,* 408 F. 2d 918, 921 (C.A. 6).

Petitioner nevertheless contends (Pet. 7) that the application of Rule 801 in criminal cases violates per se the Confrontation Clause of the Sixth Amendment.[4] But it is well settled that the right to confront witnesses does not require that all hearsay evidence be excluded. *Dutton* v. *Evans,* 400 U.S. 74, 80; *California* v. *Green,* 399 U.S. 149, 156; *Salinger* v. *United States,* 272 U.S. 542, 548; *Mattox* v. *United States,* 156 U.S. 237, 240-244. The admissibility of adoptive admissions and admissions by an agent within the scope of his authority has long been established, and Rule 801 is in complete harmony with the view that these types of statements do not constitute inadmissible hearsay. See IV Wigmore, *Evidence,* §§ 1069, 1071, 1078 (1972 ed.). Admissions made by petitioner's agents, in the course of exercising their authority to act in petitioner's place, are not different from admissions made

[4]Petitioner's reliance (Pet. 11) upon Rule 26 of the Federal Rules of Criminal Procedure is misplaced. Rule 26 provides that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by * * * the Federal Rules of Evidence, or other rules adopted by the Supreme Court." Rule 801, Federal Rules of Evidence, applies to criminal cases as well as civil cases. See *United States* v. *Ojala, supra,* 544 F. 2d at 946.

by petitioner himself, particularly where he was present and registered no complaint when the statements were made. See IV Wigmore, *supra,* at §§ 1071, 1078. See also *United States* v. *Weaver,* 565 F. 2d 129, 135 (C.A. 8).

2. Petitioner further contends (Pet. 5, 7-16) that the trial court erred in admitting the testimony by Agent Stephen Howard concerning certain statements made by petitioner's attorneys out of his presence to the effect petitioner kept no records and was not cooperating with them. The court of appeals held that these statements should not have been admitted because they were conclusory observations that were not sufficiently relevant to qualify as an exception to the hearsay rule. It concluded, however, that their admission was harmless error in the context of the case (Pet. App. 3a).[5]

Even on the assumption that the court of appeals correctly held that the admission of these statements was error, such error was "harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18. The court of appeals reviewed and considered the statements in the context of the record as a whole and determined that the error did not adversely affect the substantial rights of the petitioner and was harmless. Fed. R. Crim. P., Rule 52(a).

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[5]We do not concede that these statements were inadmissible. The court of appeals based its decision on the ground that the statements were admitted as "an exception to the hearsay rule" (Pet. App. 3a). But the statements are admissible, not as exceptions to the hearsay rule, but as statements which by definition are not hearsay at all. See Rule 801(d), Fed. R. Evid. These statements were made by petitioner's authorized representative and referred to petitioner's income tax matters for the years in question. Accordingly, they are admissible even though they were not made in petitioner's presence. *United States* v. *Dolleris, supra,* 408 F. 2d at 921; *United States* v. *O'Connor, supra,* 433 F. 2d at 755-756; Rule 801(d)(2)(C) and (D). Nor does the admission of such statements by petitioner's agent violate the Confrontation Clause (see *supra,* pp. 3-4).

The admission that the petitioner kept no records and was uncooperative with his attorneys was merely cumulative of other similar evidence. The same admission was made in petitioner's presence in the January 23, 1973 meeting (II Tr. 69-70). The business manager of the basketball team owned by petitioner stated that no records of any substance were kept for that business (II Tr. 11-17). An employee of petitioner's bail bonding business who generally took care of the business and wrote bonds likewise stated that he had not kept any records of that business (II Tr. 37). The accountant hired by the law firm to prepare petitioner's 1972 tax return also testified he was not provided with any income records in the bail bonding business, the basketball team or anything that reflected rental receipts for the various rental properties owned by petitioner (III Tr. 42-43). A letter to the accountant from petitioner similarly stated that he didn't have the facts to "construct books and records in all the business natures [*sic*] that I'm connected with" (III Tr. 35; Ex. 47). There were also substantial omissions in the information provided by petitioner to the accountant as to his acquisition of assets during 1972 (IV Tr. 158).

Finally, the evidence of petitioner's intent to evade income taxes was overwhelming. The government proved substantial understatements of taxable income by the net worth method using the testimony of an expert witness and stipulations of fact. The understatements of income taxes for 1970 and 1972 were respectively $15,265.90 and $36,043.29 (II Tr. 164). In 1971, the year petitioner failed to file a return altogether, petitioner had income of $89,506.07 (II Tr. 164). Moreover, the stipulations reflect that a large portion of petitioner's numerous dealings were transacted in cash, involving tens of thousands of dollars and that he did not even maintain a checking

account until 1972, and then only in connection with one of his businesses (Stip. I, App. A, p. 4). There was also evidence that petitioner repeatedly misled his various income tax preparers and the internal revenue agents as to his true income (I Tr. 89-94; II Tr. 58; III Tr. 36, 91). Indeed, petitioner told internal revenue agents that in 1971 the only income he had was $500 to $600 from driving a school bus (II Tr. 58). In light of this evidence, the court of appeals correctly concluded that any error in admitting the statements of petitioner's attorney made outside of petitioner's presence was harmless beyond a reasonable doubt. See *Lutwack* v. *United States,* 344 U.S. 604, 619-620.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

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[6]Petitioner also contends (Pet. 15-16) that the statements made by his attorneys violated his Fifth Amendment privilege against compulsory self-incrimination. Petitioner, however, has in no way been "compelled" to be a witness against himself. Absent "physical or moral compulsion" exerted on the person asserting the privilege, there is no basis for such a Fifth Amendment claim. *Fisher* v. *United States,* 425 U.S. 391, 397.

DOJ-1978-09